

Claimant injured both upper extremities working for respondent. In its Order of November 21, 2006, the Board awarded claimant permanent disability benefits under K.S.A. 44-510e. By its July 18, 2008, decision, the Kansas Court of Appeals reversed and remanded this claim to the Board to recalculate claimant's permanent disability benefits as injuries under the schedule of K.S.A. 44-510d. And that decision is now final as claimant's request for review by the Kansas Supreme Court has been denied.

The Kansas Court of Appeals held:

Hurlburt's workers compensation benefits for the partial loss of the use of both of her arms [should] be calculated under the scheduled injury statute, K.S.A. 44-510d, which provides the exclusive benefits for her injuries. Therefore, because Hurlburt suffered scheduled injuries, the Board's award based upon K.S.A. 44-510e is reversed and the case is remanded to the Board for calculation of Hurlburt's benefits as scheduled injuries under K.S.A. 44-510d.¹

Accordingly, the only issue before the Board on this remand is the amount of permanent disability benefits claimant is entitled to receive under the schedule of K.S.A. 44-510d for her bilateral upper extremity injuries.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, the Board finds:

This case was first decided in a June 20, 2006, Award and a June 26, 2006, Award Nunc Pro Tunc. Special Administrative Law Judge Marvin Appling determined claimant was entitled to receive permanent disability benefits under K.S.A. 44-510e for bilateral upper extremity injuries based upon a 12 percent whole person functional impairment.

By its November 21, 2006, Order, this Board increased claimant's award to one for a 37 percent work disability² as calculated under K.S.A. 44-510e. Respondent appealed that Order to the Kansas Court of Appeals, which reversed and remanded the claim to the Board to recalculate claimant's permanent disability benefits as injuries under the schedule of K.S.A. 44-510d. The Court of Appeals' decision became final on November 4, 2008, when the Kansas Supreme Court declined review.³ Consequently, the Board may now address the order of remand.

As found in the November 21, 2006, Order, claimant began working for respondent in April 2002 as a customer service representative, answering telephone calls and entering

¹ *Hurlburt v. T-Mobile USA, Inc.*, No. 97,779, 2008 WL 2796458 (Kansas Court of Appeals unpublished opinion filed July 18, 2008, *rev. denied* Nov. 4, 2008).

² A permanent partial disability that is greater than the functional impairment rating.

³ Kansas Supreme Court Rule 8.03 states that the timely filing of a petition for review shall stay the issuance of the mandate of the Court of Appeals. Pending determination by the Kansas Supreme Court on the petition for review (and during the time in which to file the petition) the opinion of the Court of Appeals is not binding. When review is denied, the decision of the Court of Appeals becomes final as of the date of the Kansas Supreme Court's denial.

information in respondent's computer system. After nerve conduction studies confirmed claimant had bilateral carpal tunnel syndrome, claimant underwent carpal tunnel release surgery on both upper extremities in February 2005. Dr. J. Mark Melhorn performed both surgeries. And in March 2005, Dr. Melhorn released claimant to return to work.

The Board made the following findings in its November 2006 Order:

Dr. Melhorn rated claimant under the [American Medical Association, *Guides to the Evaluation of Permanent Impairment* (AMA Guides)] (4th ed.) as having a 6.36 percent whole person impairment due to her bilateral arm injuries. Although the doctor released claimant to regular work, he believes she should exercise, stretch, apply heat to her upper extremities in the mornings, apply cool in the afternoons or evenings, and observe task rotation.

. . . .

Claimant's attorney hired Dr. Pedro A. Murati to evaluate claimant for purposes of this claim and to rate claimant under the AMA *Guides* (4th ed.). The doctor found claimant had a 10 percent impairment to each upper extremity, which converted to a 12 percent whole person impairment. The doctor recommended the following work restrictions and limitations for her upper extremities:

no more than frequent repetitive hand controls; no more than occasional repetitive grasp/grab; no heavy grasp; no lifting/carrying/pushing/pulling over 20 pounds, 20 pounds occasionally and 10 pounds frequently; no use of hooks or knives; no more than 20 minutes on followed by 40 minutes off keyboarding; and no use of vibratory tools.

. . . .

The Board is not persuaded that either functional impairment rating is any more accurate than the other. Accordingly, the Board averages the 6.36 percent with the 12 percent and finds claimant has sustained a 9 percent whole person functional impairment due to her bilateral upper extremity injuries. . . .⁴

The Board did not, however, make a finding in its November 2006 Order regarding the functional impairment claimant sustained to each upper extremity. Likewise, the Board did not make a finding regarding the functional impairment Dr. Melhorn placed upon each of claimant's upper extremities. But a review of the transcript of Dr. Melhorn's deposition

⁴ *Hurlburt v. T-Mobile USA, Inc.*, No. 1,021,535, 2006 WL 3598275 (Kan. WCAB Nov. 21, 2006), *rev'd and remanded*, *Hurlburt v. T-Mobile USA, Inc.*, No. 97,779, 2008 WL 2796458 (Kansas Court of Appeals unpublished opinion filed July 18, 2008, *rev. denied* Nov. 4, 2008).

indicates the doctor concluded claimant sustained a 5.3 percent impairment to each forearm under the *AMA Guides* (4th ed.).

As indicated in the November 21, 2006 Order, the Board is not persuaded that either doctor was more accurate than the other in rating claimant's impairment. Accordingly, the Board averages the ratings provided by the doctors and finds that claimant sustained a 7.65 percent impairment to each upper extremity at the forearm level as a result of the injuries she sustained working for respondent.

In conclusion, the November 21, 2006, Order entered by the Board should be modified to reflect that claimant is entitled to receive permanent disability benefits under K.S.A. 44-510d for a 7.65 percent impairment to her right upper extremity at the forearm level and for a 7.65 percent impairment to her left upper extremity at the forearm level.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this remand.⁵ Accordingly, the findings and conclusions set forth above reflect the majority's decision and not necessarily any individual member's analysis of the law or facts. And the signatures below confirm this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies its November 21, 2006, Order to award claimant permanent disability benefits under K.S.A. 44-510d for a 7.65 percent impairment to the right upper extremity at the forearm level and a 7.65 percent impairment to the left upper extremity at the forearm level.

Left Forearm

Janine L. Hurlburt is granted compensation from T-Mobile USA, Inc., and its insurance carrier for a repetitive trauma injury ending January 8, 2005, and the resulting disability. Based upon an average weekly wage of \$527.51, Ms. Hurlburt is entitled to receive 7.43⁶ weeks of temporary total disability benefits at \$351.69 per week, or \$2,613.06, plus 14.73 weeks of permanent partial disability benefits at \$351.69 per week, or \$5,180.39, for a 7.65 percent permanent partial disability to the left forearm, making a total award of \$7,793.45, which is all due and owing less any amounts previously paid.

⁵ K.S.A. 2007 Supp. 44-555c(k).

⁶ The 14.85 weeks of temporary total disability benefits were not separated between the upper extremities. Therefore, the weeks have been evenly divided between the left and right forearm injuries.

Right Forearm

Janine L. Hurlburt is granted compensation from T-Mobile USA, Inc., and its insurance carrier for a repetitive trauma injury ending January 8, 2005, and the resulting disability. Based upon an average weekly wage of \$527.51, Ms. Hurlburt is entitled to receive 7.43⁷ weeks of temporary total disability benefits at \$351.69 per week, or \$2,613.06, plus 14.73 weeks of permanent partial disability benefits at \$351.69 per week, or \$5,180.39, for a 7.65 percent permanent partial disability to the right forearm, making a total award of \$7,793.45, which is all due and owing less any amounts previously paid.

The record does not contain a written fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee in this matter, counsel must submit the written agreement to the Judge for approval.

IT IS SO ORDERED.

Dated this ____ day of December, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Marvin Appling, Special Administrative Law Judge

⁷ The 14.85 weeks of temporary total disability benefits were not separated between the upper extremities. Therefore, the weeks have been evenly divided between the left and right forearm injuries.